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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-690

ANONYMOUS,

Petitioner,

v.

HENRY A. KISSINGER, Secretary, United States Department of State, et al.,

Respondents.

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION FOR MENTAL HEALTH AND AMERICAN ORTHOPSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
INTEREST OF *Amici Curiae*	1
CONSENT OF THE PARTIES	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
ARGUMENT	5
I. This Court Should Grant Certiorari And Hold That The Peace Corps Violated the Constitutional Requirement Of Due Process When It Fired A Probationary Employee Who Refused To Allow Unlimited Governmental Intrusion Into The Psychotherapist-Patient Relationship	7
II. This Court Should Grant Certiorari To Define The Nature of Petitioner's Constitutional Privacy Right In His Confidential Relationship With His Psychotherapist	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

Arnett v. *Kennedy*, 94 S. Ct. 1633 (1974) 6, 8

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 6

Cafeteria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961) 7, 15

Doe v. *Bolton*, 410 U.S. 179 (1973) 17

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 16

Gotkin v. *Miller*, F. Supp. , (E.D.N.Y. 1974) (*appeal pending*, 2d Cir. No. 74-2138) 11, 14

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 16, 17

PAGE

Slovenko, Psychiatry and the Law (1973) 14

Slovenko, Psychotherapy, Confidentiality and Privileged Communication (1966) 12, 14

Standard 34, American Psychiatric Association Standards for Psychiatric Facilities (1969) 12

Strassburger, *Problems Surrounding 'Informed Voluntary Consent' and Patient Access to Records, American Psychiatric Association Conference on Confidentiality of Mental Health Records* (Nov. 7-9, 1974) 12

Waelder, R., Basic Theory of Psychoanalysis (1960) ... 9

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INTEREST OF *AMICI CURIAE*

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Approximately 20,000 of the nation's 25,000 psychiatrists are members of the Association.

The American Psychological Association is a non-profit professional organization of 40,000 psychologists of whom almost sixty percent are directly involved in areas of psychology which involve confidential patient relationships. The Association has participated in conferences and other proceedings

designed to protect the confidentiality of the psychotherapist-patient relationship.

The National Association for Mental Health is a citizens organization of one million lay and professional members whose purpose is to encourage efforts to prevent and treat mental illness and to improve the quality of mental health services throughout the nation.

The American Orthopsychiatric Association is a professional organization with a membership of 4,000 psychiatrists, psychologists, psychiatric social workers and mental health professionals.

All four of these non-profit organizations have a professional commitment to the timely diagnosis, care, and treatment of people with mental and emotional problems, including citizens in the employ of the United States Government. The ethics of their professions require that they keep in the strictest confidence revelations made to them by patients seeking help and that they do nothing in the course of diagnosis or treatment to injure the best interests of the patient. They are convinced that an aura of strictest confidentiality must surround the therapist-patient relationship if troubled persons are to feel free to seek professional help and to cooperate fully in treatment. Although they recognize the government's need in some circumstances for assurances of their employees' emotional and mental stability, they believe that such a need can and must constitutionally be accommodated by direct communications with the therapist and not by a wholesale demand for all of the patient's records compiled in the course of diagnosis or therapy. *Amici* are also convinced that the threat of exposure of all their records will prevent present and prospective government employees from seeking and receiving necessary help with their mental or emotional problems, to the detriment of themselves and the nation.

CONSENT OF THE PARTIES

Amici are filing this Brief with the consent of both parties. Letters to that effect have been filed with the Clerk.

QUESTION PRESENTED

Whether the Peace Corps acted arbitrarily and capriciously, in violation of the Due Process Clause of the Fifth Amendment and the Constitutional Right to Privacy, when it fired a probationary employee who declined to give government investigators *unlimited* access to *all* medical records of his treatment by private psychiatrists.

STATEMENT OF THE CASE

In November, 1968, petitioner was given a temporary appointment to a "non-critical sensitive position" in the Peace Corps, pending a full field investigation.[1] From that date until his dismissal in April, 1969, petitioner's "performance on the job was entirely satisfactory and his loyalty was not questioned." *Anonymous* v. *Kissinger*, 499 F.2d 1097, 1098 (D.C. Cir. 1974). After informing government investigators that he had on two occasions briefly consulted psychiatrists with minor problems related to anxiety, he was, in February, 1969, "subjected to a humiliating and degrading interrogation dealing principally with his sex life." *Id.* Subsequently, petitioner refused to see the Peace Corps' Senior Consultant in Psychiatry and rescinded a previously executed release making confidential medical information available to the agency. Petitioner *offered to have his private doctors submit written reports for government review* and to see a government psychiatrist if accompanied by his own lawyer and doctor. As the Court of Appeals noted,

> The agency, however, insisted upon an examination by a psychiatrist selected or employed by the government *and* upon access to *all* appellant's [petitioner's] *medical records* in the possession of his psychiatrists . . . [A]ppellant was advised by the agency that he would be

[1]Petitioner was employed as a correspondent analyst. In a letter dated March 28, 1969, Ruth Olsen, director of the Peace Corps' Office of Personnel, described petitioner's job as a "non-critical sensitive position." *Anonymous* v. *Kissinger*, 499 F.2d 1097, n7 (1974). The job was classified as sensitive pursuant to Executive Order 10450, 3 C.F.R. § 936 (1949-1953 Comp.).

> dismissed *if he did not release his medical records* and submit to questioning by a Government psychiatrist.

Id. at 1099 (emphasis supplied).[2]

On March 28, 1969, petitioner filed suit seeking to enjoin his dismissal from the Peace Corps. Two weeks later, after his motion for a preliminary injunction was denied, he was fired by the agency pursuant to 22 U.S.C. § 1008.[3] In a Memorandum and Order dated October 26, 1972, the District Court held that the Peace Corps' request for access to all medical records and for petitioner's appearance before a government psychiatrist were "reasonable and relevant to the planitiff's suitability for holding a sensitive position and that his discharge for refusal to cooperate was reasonable as well." Petitioner's Brief at 26.

The Court of Appeals ruled that, as a temporary employee, petitioner had no statutory protection against peremptory agency dismissal.[4] *Anonymous, supra,* 499 F.2d at 1102. It stated that

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[2]The termination letter from Personnel Director Olsen to petitioner, see note 1, *supra,* stated:

> It is our obligation to resolve any doubts regarding the suitability for continued employment of Peace Corps personnel and we are unable to do so in your case because of your refusal to cooperate in this effort. Specifically, *you have refused to authorize the release of information concerning medical treatment you have received in the past,* and to discuss this issue with our own medical personnel. (Emphasis supplied.)

[3]That section provides, in pertinent part:

> . . . the Secretary may, under such regulations as he may prescribe, terminate at any time the services of any Reserve officer or staff officer or employee serving under limited appointment . . . .

The relevant regulation, which is found in Foreign Affairs Manual § 763.1, states:

> . . . a staff officer or employee serving under a temporary or limited appointment may be separated at any time by a notice in writing.

[4]*Anonymous, supra,* 499 F.2d at 1102. The relevant statutory provision and the supplementing regulation do not require that dismissal only be for "cause" nor do they mandate a hearing in the event of dismissal. They do provide for notice in writing, which petitioner was given.

petitioner had a "property interest" in his job cognizable under the Due Process Clause of the Fifth Amendment, but that the petitioner was not entitled to a hearing on his termination. The Court held that the Constitution did impose a substantive limitation on the agency's action:

> [o]ne in a temporary position—or pending completion of an investigation—is protected only by due process of law from patently arbitrary or discriminatory dismissal.

Id. at 1102. Although noting that the "agency would have been well advised . . . to have accepted one of the compromises proposed by appellant," the Court of Appeals concluded that "the method of inquiry proposed by the agency . . . was not so unreasonable as to result in a deprivation of appellant's property interest inconsistently with the Fifth Amendment." *Id.* at 1103. The Court also ruled that petitioner's "constitutional right to privacy" was not infringed.

ARGUMENT

The instant case presents a clearly defined question of "federal law which has not been, but should be settled" by this Court:[5] may the government intrude upon the psychotherapist-patient relationship by demanding unbridled access to *all* the psychiatric records of a probationary employee.[6] To put the

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[5]Supreme Court Rule 19.

[6]Petitioner was, in effect, fired for refusing to yield up all his psychiatric records. He was never given a choice of cooperating with government investigations *either* by allowing the government access to all his records *or* by seeing a government psychiatrist. *See* note 2, *supra.* Hence his dismissal turns on the records issue, since he was not fired just for refusing to see a government doctor. Because the Court of Appeals' disposition of the records issue will have such severe consequences on the relationship between patients and their psychotherapists, *amici* have concentrated on that issue.

However, the additional issue raised by petitioner, regarding compelled psychiatric interviews, presents important problems as well, in *amici's* view. And our emphasis on the records issue in this brief does not reflect on the merits of other matters raised by petitioner.

case in perspective, it is important to understand the issues which *amici curiae* believe are *not* before this Court. *Amici* do not question the validity or utility of government investigations in determining the suitability of prospective employees. They do not argue here that all information—as opposed to all actual medical records—concerning a probationary employee's psychiatric or psychological treatment should be withheld from government investigators, since relevant information may be easily obtained through direct reports by an employee's treating mental health professional. Nor do *amici* contend that petitioner was entitled to a termination hearing under the requirements of procedural due process.[7]

What *amici curiae* do respectfully submit is that under the substantive standards of review announced in previous decisions of this Court, this Court should grant *certiorari* and hold that government agencies violate the Constitution when they demand, upon pain of dismissal, unconditional access to all psychiatric or psychological records developed by a mental health professional during a probationary employee's course of treatment. This sharply focused question is of great import. *Amici* submit that if the Court of Appeals' rule is left standing and if government investigators have license to explore all of a temporary employee's medical and psychiatric records at will, then substantial unfairness to employees will result, potential civil servants throughout the nation will be reluctant to seek diagnosis and treatment from mental health professionals, and mental health professionals will be hindered in their efforts to provide necessary treatment to prospective or probationary employees.

Amici's contention that the Constitution has been violated by the Peace Corps' arbitrary dismissal of petitioner is premised on two arguments. First, *amici* contend that this Court should

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[7]Despite the Court of Appeal's ruling that petitioner had a limited property interest in his job "incident to his position, even though it is of a probationary or non-tenured character," *Anonymous, supra,* 499 F.2d at 1102, *amici* do not believe this Court need decide whether, as a matter of Constitutional law, petitioner should have been given a hearing before his dismissal. *Cf. Perry* v. *Sinderman,* 408 U.S. 593 (1972), *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) and *Arnett* v. *Kennedy,* 94 S. Ct. 1633 (1974).

grant *certiorari* because the agency violated the constitutional guarantee of Due Process by conditioning petitioner's employment on arbitrary and unfair governmental intrusion into the psychotherapist-patient relationship even though the relationship need not, for purposes of this argument, be given a constitutional dimension. Second, the action of the agency had the effect of arbitrarily conditioning petitioner's employment on the surrender of his constitutional right to privacy in his relationship with his psychotherapist.

I. This Court Should Grant Certiorari And Hold That The Peace Corps Violated The Constitutional Requirement Of Due Process When it Fired A Probationary Employee Who Refused To Allow Unlimited Governmental Intrusion Into The Psychotherapist-Patient Relationship.

(1) It is well-established that "there exist constitutional restraints upon state and federal governments in dealing with their employees . . . ." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 897-98 (1961); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952); *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). Even though a federal employee may not have a right to public employment under the Due Process Clause, *Wieman, supra* at 192, the federal government cannot remove an employee "if the *announced* grounds for . . . [the] exclusion . . . [have] been patently *arbitrary or discriminatory.*" *Cafeteria Workers, supra* at 898 (emphasis supplied). As the Court of Appeals observed in the instant case, this substantive limitation on governmental action applies whether the person fired is a probationary or permanent employee. *Anonymous supra*, 499 F. 2d at 1102. *See also Perry, supra* at 596-97.[8]

(2) This Court has often held that government agencies have "arbitrarily" and therefore unlawfully dismissed a public

[8]The constitutional standard of "arbitrariness" is, presumably, less broad than the "for cause" standard which limits Peace Corps dismissals of regular employees, 22 U.S.C. § 1007.

employee because they conditioned employment on surrender of constitutionally protected rights. *See, e.g., Perry* v. *Sinderman, supra,* 408 U.S. at 597; *Wieman* v. *Updegraff, supra,* 344 U.S. at 192; *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); U.S. at 192; *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968); *cf. Tygrett* v. *Washington* (D.C. Cir. No. 72-1876, October 23, 1974). Government, that is, may not penalize or inhibit the enjoyment of constitutionally protected freedoms through the employment relation, *Perry, supra* at 597, for this would allow government to do indirectly what it "could not command directly." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). Similarly, a holding that government has unreasonably dismissed a public employee may be based on grounds other than an agency demand that employees forego exercise of constitutional liberties:

> The concern of the Court that fundamental fairness be observed when the State deals with its employees has not been limited to action which is discriminatory and infringes on constitutionally protected rights. . . .

Arnett v. *Kennedy,* 94 S. Ct. 1633, 1658 (1974) (White, J., concurring in part and dissenting in part). *See also Slochower* v. *Board of Education,* 350 U.S. 551 (1956).[9]

In this section, *amici* maintain that the agency's intrusion into the important psychotherapist-patient relationship is arbitrary and unfair, even though the relationship itself need not be

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[9]As Justice White stated in his separate opinion in *Arnett* v. *Kennedy,* 94 S. Ct. 1633, 1659 (1974):

> In *Slochower* . . . New York law provided that a tenured employee taking the Fifth Amendment before a legislative committee inquiring into his official conduct could be fired. Quite apart from the Fifth Amendment "penalty" assessed by the State, the Court was concerned with the arbitrariness of drawing a conclusion, without a hearing, that any employee who took the Fifth Amendment was guilty or unfit for employment.

• *See generally,* Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees,* 19 U.C.L.A. L. Rev. 1052 (1972); Note, *Dismissal of Federal Employees—The Emerging Judicial Role,* 66 Col. L. Rev. 719 (1966).

accorded constitutional protection. (For the argument that the agency arbitrarily conditioned employment on surrender of a constitutional privacy right, see Section II, *infra.*)

(3) The maintenance of a confidential psychotherapist-patient relationship is necessary for two basic reasons. First, the promise of confidentiality is imperative if a psychotherapist[10] is to establish a successful treatment relationship with a patient, since patients must feel free to reveal their most personal thoughts, experiences, fantasies and memories.[11] Second, if patients cannot be assured of a confidential relationship with their psychotherapist, they will refrain from seeking the expert assistance of a mental health professional when they need it.[12] These rationales and the paramount importance of a confidential psychotherapist-patient relationship are manifested in medical

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[10]There is little, if any, difference in patients' minds between disclosures made to neutral health professionals with a medical degree (psychiatrists and psychoanalysts) and those with doctorates (psychologists). *See* J. Robitscher, Pursuit of Agreement: Psychiatry and the Law 215 (1966). *See also* Proposed Rules of Evidence for United States Courts and Magistrates, Rule 504(a)(2) (licensed psychologists included in psychotherapist-patient privilege).

[11]Robitscher, *supra,* note 10, at 230-232; S. Freud, The Interpretation of Dreams 100-101 (Std. Ed. Vol. 4, Hogarth, London (1958)). ("We . . . tell him that the success of the psychoanalysis depends on his noticing and reporting whatever comes into his head. . . .") *See also* R. Waelder, Basic Theory of Psychoanalysis 238 (1960).

[12]Goldstein and Katz, *The Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute,* 36 Conn. Bar J. 174, 178-179 (1962)

> . . . the overwhelming view of psychiatrists is that patients need and expect assurance that their disclosures will remain confidential. The patient, however much in need of treatment, is ordinarily reluctant to seek it. . . . Even under optimum conditions of confidentiality, it is difficult for the patient to confide his thoughts and feelings to another person. If to that difficulty is added the possibility of disclosure at some future date, it can be expected that he will not speak freely and that his concern about the other implications of treatment will be reinforced.

ethics[13] and in statutory privilege.[14] Moreover, the significance of the relationship is reflected in the Proposed Rules of Evidence for United States Courts and Magistrates approved by this Court in 1972. The proposed rules recognize a special psychotherapist-patient privilege, while refusing to adopt a general privilege for physician and patient. Rule 504. As a succinct statement of the basis for the privilege, the Advisory Committee Note quotes from Report No. 45, Group for the Advancement of Psychiatry 2 (1960):

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' con-

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[13] *See, e.g.*, Judicial Council of the American Medical Association, *Principles of Medical Ehtics*, J. A.M.A. Sp. Ed. June 7, 1958 Section 9; American Medical Association House of Delegates Resolution 39 (June 1974) (importance of AMA "efforts to develop methods to minimize the demands for medical record information, the increasing dissemination of the same, and for protection of our patients from harm by such information inadvertently or intentionally being misused, or by the misapplication of this personal data for other than the original medical purposes; . . . .").

[14] *See, e.g.*, Cal. Evidence Code §§ 1010-1026; Ga. Code § 38-418 (1961 Supp.); Conn. Gen. Stat. § 52-146a (1966 Supp.); Ill. Rev. Stat. 1967, c. 51 § 4.2; Advisory Committee Note to Rule 504, *supra* note 10; Goldstein & Katz, *supra* note 12, at 180-181; Louisell, *Confidentiality, Conformity and Confusion*, 31 Cal. L. Rev. 101, 108 n.39 (1956). *See also Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) ("In regard to mental patients, the *policy behind such a statute is particularly clear and strong.* Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." (emphasis supplied.)).

scious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

(4) In this case, the agency's demand for unqualified intrusion into the important psychotherapist-patient relationship was arbitrary. Unrestricted access to *all* of the petitioner's clinical records was unnecessary and would elicit irrelevant, misleading and possibly prejudicial material of a highly personal nature. The fundamental unfairness of conditioning employment on the yielding up of such material is best understood by examining three related factors: the nature of the records; the scope of material contained in the records; and the nature of the waiver demanded of petitioner.

(a) *Nature of the Records.* By requesting access to all of petitioner's clinical records, the agency was, in effect, seeking to obtain raw data from petitioner's doctors which, besides being either irrelevant or prejudicial, would not, in all likelihood, reflect the doctors' rounded view of the petitioner's mental condition at the time of treatment. There is no universally accepted method for recording psychiatric or psychological therapies. Accordingly, information contained in a written record may take the form of sketchy and incomplete notes rather than a fully developed case history.[15] Moreover, the content of such "records" will vary widely with the particular mental health professional: "speculative material" and "creative jottings" re-

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[15]*See* Gabrielli, "Background Paper on Topic Five for American Psychiatric Association Conference on Confidentiality of Health Records," November 7-9, 1974 (hereinafter Confidentiality Conference); Jackson, "Consideration of the 'Active Working Record' versus the 'Permanent Record'" (Working Paper for Confidentiality Conference); *Gotkin* v. *Miller*, (unreported) (E.D.N.Y. 1974) (*appeal pending*, 2d Cir. No.74-2138) (Joint Appendix on Appeal, A-45-46, Affidavit of Marvin Lipschitz, Medical Director of Gracie Square Hospital) ("It must be remembered, of course, that many of these records contain the of-the-moment ruminations of physicians, as well as the impulsive and other utterances of the patients. . . .").

flecting the therapists" immediate perceptions or diagnoses may be included but subsequent modifications or alternative conclusions may not.[16] And written records may be sketchy precisely because therapists fear that exposure will harm their patients.[17] Thus, clinical records may, by their very nature, give a distorted or fragmented portrait of the patient to third parties, and mental health professionals are extremely reluctant to disclose such records to anyone other than a professional treating the same patient.

The unfairness of requesting access to such misleading raw data is especially acute in the case of a probationary employee. Since such an employee is accorded no right to a hearing by statute, government personnel—even trained professionals—may draw unwarranted conclusions from the data without providing the probationary employee or his therapist an opportunity to place the material in context or to correct errors.

(b) *Scope of records.* A therapist's written record of his contact with a patient may be as broad as the patient's whole psychological history and will thus contain material which, al-

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[16]Strassburger, "Problems Surrounding 'Informed Voluntary Consent' and Patient Access to Records," (Paper for "Confidentiality Conference", note 15, supra.) (". . . with the passage of time . . . the original speculative nature of the material tends to be minimized or forgotten and a 'creative jotting' can haunt a poor patient for the rest of his life."). Moreover, such records may be easily misinterpreted since they are usually written in "the specialized language of psychiatry", GAP Report No. 45, *supra* at 92-93. *Compare* American Psychiatric Association Standards For Psychiatric Facilities (1969), Standard 34 (urging very complete records) with GAP Report No. 45, at 92 (cautioning that complete records may lead to harm to patients).

[17]*See* R. Slovenko, Psychotherapy, Confidentiality, and Privileged Communication 116 (1966):

> [T]he best protection that can be ensured to the patent is the exercise of extreme caution in writing records. . . . Incomplete clinical records, of course, are not scientifically desirable, but the therapist is in the unfortunate position of having to choose between keeping incomplete records or no records at all, or, on the other hand, of subjecting his patient to the possibility of having his most intimate confidences revealed. . . .

See also Lewis, *Confidentiality in the Community Health Center*, 37 Am. J. Orthopsychiatry 946, 951 (1967).

though highly personal, is of no relevance to the probationary employee's job capability.[18] Not all personal information is relevant to job fitness, for as the former Senior Psychiatric Consultant to the Peace Corps and the Chief Psychiatrist of its medical division have written:

> The Peace Corps Psychiatric Branch, on seeking information about an applicant's emotional stability, has no intention of interfering with effective psychotherapy or in hearing confidential information which is unrelated to the issue at hand.[19]

Even the Civil Service Regulations which authorize investigations into a probationary employee's mental history do not speak in such broad terms as to require or even authorize a demand for access to all medical records.[20] Thus, it is fundamentally unfair and arbitrary to require total disclosure of records which may cover the whole scope of the temporary employee's personality and psychological development, for, again,

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[18]In fact, many psychiatrists feel that even their professionally screened impressions of the patient do not permit evaluation of his potential ability to perform in a job situation outside of the therapy relationship. *See* Menninger and English, *Confidentiality and the Request for Psychiatric Information for Nontherapeutic Purposes,* 122 Am. J. Psychiatry 638, 640-44 (1965). They may feel their impression of the patient in therapy may be totally irrelevant or actually misleading as an indicator of his ability to function in the outside world. Errera, *Common Sense Approaches to Confidentiality,* 19 Hospital and Community Psychiatry 347 (1968).

[19]Menninger and English, *supra* note 18, at 640.

[20]Ex. Order 10450, 3 C.F.R. Cod. Pres. Doc. Ch. IV § 8 (1973) authorizes investigation into "any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee with due regard to the transient or continuing effect of the illness and the medical findings in such cases." *Cf.* 5 C.F.R. 294.401(b) (1973) (providing that access to medical information about an employee in the government's possession on request of the employee "concerning a mental condition of such a nature that a prudent physician would hesitate to inform a person suffering from it of its exact nature and probable outcome may be disclosed only to a licensed physician designated in writing for that purpose by the individual or his designated representative.").

there is no way to counter irrelevant, misleading or prejudicial matters.[21]

(c) *Nature of the Waiver.* Under the ruling of the Court of Appeals, a probationary employee must waive his interest in a confidential psychotherapist-patient relationship and allow access to all his clinical records or suffer dismissal. But in most instances, a temporary employee has not seen his own psychiatric records. There is basic unfairness when a probationary employee is required to waive confidentiality and allow government investigators access to raw records, the contents of which he does not know—and this is especially so given the potential problems regarding the nature and scope of those records outlined above.[22] Moreover, many hospitals and mental health professionals will not accede to requests by patients to view the patients' records.[23] Thus, many probationary employees in petitioner's position may not have a legally recognized right to see their records, even if they want to.[24] Surely it would be arbitrary and unfair to dis-

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[21]Moreover, there is no way to control what happens to such records, once they are handed over to the government, or who will see them. *See, e.g.,* Menninger and English, *supra* note 18, at 642. ("The Peace Corps acknowledges that many areas of our society and indeed other government agencies may consider psychiatric contact a stigma, and further may not maintain such information in a confidential file separate from the personnel file. It is only human for an applicant to have reservations about giving permission for the agency to have access to the information when it is so open to misinterpretation. . . .")

[22]*See* Robitscher, *supra* note 10, at 206; GAP Report No. 45, *supra* note 16, at 99; Slovenko, Psychotherapy, *supra* note 17, at 154 ("When the patient waives the psychotherapy privilege he does not know what he is waiving.") *See also* R. Slovenko, Psychiatry and the Law 440 (1973).

[23]They will only disclose such records to another therapist designated by the patient. *See, e.g., Gotkin* v. *Miller, supra* note 15, (reported in Joint Appendix on Appeal A-90, note 8) ("Statistically, the overwhelming majority of states do not permit a former mental patient access to his medical records either directly or indirectly, prior to the maintenance of a suit for malpractice," citing DHEW, Appendix to Report of Secretary's Commission on Medical Malpractices (Cal. 1973) at 181.).

[24]*Gotkin* v. *Miller, supra* note 15; *Van Allen* v. *McCleary,* 211 N.Y.S. 2d 501 (Sup. Ct. Nassau Cnty. 1961); *Wallace* v. *Univ. Hosp. Cleveland,* 164 N.E. 2d 916 (Ct. Comm. Pleas. Ohio 1959).

miss a temporary employee for refusing to waive his confidential interest in his clinical records when he has no legally recognized right of access to those records in the first place.

(5) To hold that the agency's request for access to all petitioner's psychiatric records is fundamentally unfair and arbitrary is not, of course, to rule that the government may not specifically inquire into a course of psychiatric treatment received by probationary employees when the agency seeks to determine suitability for permanent employment. Mental health professionals are cognizant of the federal government's need to ascertain the emotional stability of applicants, especially those who would be employed in sensitive positions. But that need can be fully and effectively met by a direct report, presented either orally or in writing, from the treating mental health professionals who, with the consent of their patients, can respond to specific questions and synthesize, where appropriate, their understanding of their patients' condition.

When the government trenches upon the sensitive area delimited by the psychotherapist-patient relationship, judicial review of agency action should follow the method of analysis suggested, albeit in a procedural context, by this Court in *Cafeteria & Restaurant Workers Union* v. *McElroy, supra* at 895: ". . . what . . . due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." In the instant case, when governmental needs could be met more effectively and expeditiously in another manner and when the method of investigation chosen unfairly intrudes into the vitally important and widely accepted patient interest in a confidential relationship, then the agency acts arbitrarily, in violation of Due Process guarantees, if it dismisses a probationary employee, who has no statutory right to a termination hearing, for failing to give government investigators unqualified access to all his clinical records. This Court should grant *certiorari* to so hold.

II. This Court Should Grant Certiorari To Define The Nature Of Petitioner's Constitutional Privacy Right In His Confidential Relationship With His Psychotherapist.

An alternative ground for reversing the Court of Appeals' decision is that the Peace Corps' request for all petitioner's psychotherapeutic records unnecessarily infringes his constitutional right to privacy in his confidential relationship with his psychotherapist. By conditioning petitioner's employment on an invasion of his right to privacy, the agency acted arbitrarily and capriciously in violation of the Constitution.

The threshold issue in this argument—whether petitioner's constitutional privacy right extends to the treatment relationship with his psychotherapist—may be addressed by this Court in *Roe* v. *Doe*, No. 73-1446, *cert. granted*, 43 U.S.L.W. 3038 (Aug. 13, 1974).

(1) It is well established, of course, that "a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution." *Roe* v. *Wade*, 410 U.S. 113, 152 (1973). In determining whether a particular interest is within the constitutionally protected zone of privacy, this Court has looked to several factors. First, matters affecting the *fundamental autonomy of the individual* have received protection. *Roe* v. *Wade*, *supra* at 153; *Eisenstadt* v. *Baird*, 405 U.S. 438, 452 (1972). Second, matters affecting *intimate relationships* such as family, marriage, motherhood and child-rearing have been deemed within the ambit of constitutional privacy. *Roe* v. *Wade*, *supra* at 152-53; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 66 n.13 (1973). Third, the *place* where fundamental autonomy has been exercised or the intimate relationship fulfilled—such as the home—has been considered. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Paris*, *supra*. Finally, a person's interest in *selective disclosure of highly personal matters* regarding intimate relationships has

been held to be within the constitutional zone of privacy, *Griswold, supra* at 485.[25]

(2) In the instant case, those factors to which this Court has looked in establishing constitutional privacy rights are manifestly present. The unqualified intrusion by governmental investigators into petitioner's psychiatric records inhibits the fundamental autonomy of prospective government employees by discouraging individuals from seeking the help of mental health professionals or by impairing a treatment relationship which might make individuals well. Such intrusion also affects the intimate relationship between a patient and his psychotherapist—a relationship in which the patient brings forth highly personal matters that may not even be revealed to intimate family members. See pp. 9-15, *supra*. The decisions in *Roe* v. *Wade, supra*, 410 U.S. at 153, and *Doe* v. *Bolton*, 410 U.S. 179 (1973), have stressed the fundamental importance of the relationship between patients and their doctors regarding intimate and private matters. *See also United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 127 n.4 (1973) ("sphere of constitutionally protected privacy, such as that which encompasses the intimate medical problems of family, marriage and motherhood"). Further, in *Paris, supra at* 66 n.13, this Court observed that the "constitutionally protected privacy" surrounding intimate relationships "extends to the *doctor's office*, [and] *the hospital*" (emphasis supplied). And it is obvious that patients have a profound interest in the selective disclosure of the highly personal information that is developed during the course of a therapeutic relationship with a mental health professional. Accordingly, petitioner, in the circumstances of this case, had a constitutional right in a private relationship with his treating psychiatrists. And

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[25]*Griswold* may be read as expressing this Court's concern about governmental investigation and disclosure of highly personal material relating to marriage ("Would we allow the police to search the sacred precincts of the marital bedroom for telltale signs of the use of contraceptives.") *See* Note, *Roe and Paris: Does Privacy Have a Principle*, 26 Stan. L. Rev. 1161, 1163-65 (1974); Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920, 929 (1973). The philosophical writing on privacy has given special weight to the selective disclosure dimension of the privacy concept. *See* Note, *Roe and Paris: Does Privacy Have a Principle*, *supra*.

such privacy rights are "fundamental," and may be abrogated only for a "compelling state interest." *Roe* v. *Wade, supra,* 410 U. S. at 153-5.

(3) Establishment of petitioner's fundamental right to privacy in his relationship with his psychotherapist does not mean that the federal government's legitimate interest in determining the suitability of a probationary employee must be given no weight. *Cf. Pickering* v. *Board of Education,* 391 U.S. 563 (1968). "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate." *Roe* v. *Wade, supra,* 410 U.S. at 154. The guiding principle, which accommodates petitioner's privacy right and the government's interest in hiring suitable employees, has been succinctly expressed in an oft-quoted passage from another public employment case:

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of . . . [governmental] abridgement must be viewed in light of less drastic means for achieving the same basic purpose.

Shelton v. *Tucker,* 364 U.S. 479, 488 (1960). *See also Roe* v. *Wade, supra* at 155. Thus, the Peace Corps acted arbitrarily, in violation of the Constitution, since it conditioned petitioner's employment on an unqualified infringement of petitioner's constitutional right to privacy, *Perry* v. *Sinderman, supra,* 408 U. S. at 597. Requesting unbridled access to all psychiatric records was both unfair and unnecessary because an alternative method of investigation existed—direct consultation with petitioner's doctors—which would have been less intrusive, as well as more effective, expeditious, and just. See Part I, *supra.*

CONCLUSION

The decision by the Court of Appeals will have a significant impact on the employment practices of the federal government

since a great proportion of federal employment litigation must be brought in the District of Columbia Circuit. For this reason, and for the other reasons set forth above, *amici curiae* respectfully request that this Court grant *certiorari* to decide whether a probationary employee may be fired for declining to give government investigators *unlimited* access to *all* records of his treatment by private psychotherapists.

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